SUPREME COURT, U.S.
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No. 73-913

In the Supreme Court of the United States

OCTOBER TERM, 1973

DENIS HANLY, ET AL., PETITIONERS

v.

WILLIAM B. SAXBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

Department of Justice,
Washington, D. C. 20530.

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Petitioners contend that the National Environmental Policy Act requires the General Services Administration to prepare an environmental impact statement considering the effect of the construction of a jail in New York City. They allege that there is a conflict in the circuits concerning the test to be applied in identifying major federal actions which significantly affect the environment and thus require

an impact statement; they also contend that GSA has acknowledged that the construction of the jail would significantly affect the environment, and that they are entitled to an adversary hearing on the question of the jail's effect on the environment.

This case arises from the determination by the General Services Administration (GSA) that the construction of a jail as an addition to the Foley Square courthouse area in lower Manhattan would not have a significant effect on the local human environment, and that the jail could therefore be built without the filing of a detailed environmental impact statement under Section 102(2)(C), of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). The petitioners challenge that factual determination. In earlier stages of this case, they sought injunctive relief to halt construction of the jail pending GSA's issuance of the full scale statement petitioners assert must be filed on this project. Petitioners succeeded in their first two appearances in the Second Circuit in requiring GSA to amplify its explanation of the considerations on which its "no impact" finding was based. Petitioners each time unsuccessfully sought certiorari without awaiting further proceedings in the district court, primarily because construction has never been stayed. See *Hanly* v. *Mitchell*, 460 F.2d 640, certiorari denied *sub nom. Hanly* v. *Kleindienst*, 409 U.S. 990 (*Hanly I*); *Hanly* v. *Kleindienst*, 471 F.2d 823, certiorari denied, 412 U.S. 908 (*Hanly II*).

The district court has now granted the respondents' motion for summary judgment; it determined that GSA has complied with NEPA in concluding, on the basis of appropriate procedures and findings, that no significant impact on the human environment in the Foley Square area will result from the construction of the jail (App. A, *infra*). The court of appeals affirmed (Pet. App. 5a-13a).

The decision of the court of appeals is correct, and does not conflict with the decision of any other court of appeals.

Petitioners contend that there is a serious conflict among the circuits concerning the interpretation of 42 U.S.C. 4332(2)(C), which requires environmental impact statements for "major Federal actions significantly affecting the quality of the human environment." The conflict, petitioners assert, concerns whether this language "constitutes a two-test standard—i.e., (1) is the action 'major'? and (2) does it 'significantly affect the quality of the human environment'?—or is it a unitary or single test standard 'major' and 'significantly' etc. being used together for emphasis?" (Pet. 44). Petitioners do not explain why this alleged conflict is significant. The cases cited by petitioners as supporting the "unitary" test simply assume without discussion that the federal action involved is one that requires a finding regarding environmental impact (see cases cited at Pet. 48-50). But even if they could be read as indicating that an agency must consider whether *any* of its actions will significantly affect the environment, no con-

flict with the instant decision would be shown, since both courts below found that GSA did properly consider that question and properly concluded that there will be no significant effect.

Petitioners contend that letters sent by GSA to city and state officials concerning this project acknowledged that the jail would significantly affect the environment, and that the agency's contrary findings in the reports reviewed by the courts below therefore should have been ignored. The letters, however, made no findings, under either NEPA or the Intergovernmental Cooperation Act. They simply referred to the latter Act and its implementing directives which, they stated, "direct that there be consultation with the appropriate officials in the planning of any federal project which may have a substantial impact on the community" (Pet. App. 10a-11a, n. 1). As the court of appeals notes, however, this was not in any sense a formal GSA finding that the jail *would* have such an impact. It is thus not necessary in this case to consider whether a finding under the Intergovernmental Cooperation Act is the equivalent of a finding under NEPA.

Finally, petitioners contend that it was improper for GSA to base its decision concerning the lack of any significant environmental impact on material which was not presented at the public hearing held to permit the submission of community views. As the courts below held, however, *Hanly II* did not indicate that petitioners are entitled to an adversary type hearing. Instead, the court of appeals specifi-

cally stated that GSA might conclude that public participation limited to the agency's "informal acceptance of relevant data" would be sufficient. *Hanly* v. *Kleindienst*, 471 F.2d 823, 836 (C.A. 2); cf. *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275, 1284 (C.A. 9); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 656 (C.A. 10). Petitioners were given an adequate opportunity to present their views and provide the agency with additional relevant information. As both courts below concluded, no more is required.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 716

DENIS HANLY, ET AL., PLAINTIFFS

—against—

RICHARD G. KLEINDIENST, ETC., ET AL., DEFENDANTS

MEMORANDUM

TENNEY, J.

This case is now before the Court for a third time on plaintiffs' motion for a preliminary injunction, pursuant to Fed. R. Civ. P. 65, enjoining the construction of the Metropolitan Correction Center (hereinafter "MCC").[1] In addition, defendants have now moved for summary judgment pursuant to Fed. R. Civ. P. 56 with regard to plaintiffs' cause of action for injunctive relief. For the reasons set out *infra* plaintiffs' motion is denied and defendants' motion is granted.

Since the factual and procedural history of the action is thoroughly documented in two district court and two circuit court opinions, this Court will confine itself to a brief review of the facts relevant to

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[1] The Court of Appeals, in *Hanly* v. *Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972), affirmed this Court's denial of plaintiffs' motion for a preliminary injunction enjoining construction of the new U.S. Attorney's Office Building.

the instant motion. The basis for the underlying suit and motions for preliminary injunction is, and was, a claim by plaintiffs, all of whom are residents of the area surrounding the construction site, that defendants did not comply with § 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332 (2)(C), in that they failed to prepare a detailed environmental impact statement. This Court agreed with defendants, on the first motion, that the General Services Administration (hereinafter "GSA"), the agency responsible for the construction of the MCC, had properly determined that a detailed statement was not necessary because the project did not significantly affect the quality of the human environment and, thus, denied plaintiffs' motion. *Hanly* v. *Mitchell*, 72 Civ. 716 (S.D.N.Y. Mar. 22, 1972).

The Second Circuit Court of Appeals reversed that portion of this Court's decision concerning the MCC and remanded the action for a proper determination by GSA, taking into account all relevant factors of whether the MCC would significantly affect the quality of the human environment. *Hanly* v. *Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) (hereinafter "*Hanly I*").

A second statement was prepared and submitted by GSA which again concluded that a detailed statement was not required. Once again, this Court denied plaintiffs' motion for a preliminary injunction. *Hanly* v. *Mitchell*, 72 Civ. 716 (S.D.N.Y. Aug. 7, 1972). On appeal, the Second Circuit carefully examined the second preliminary statement. Although the Court found that, on the whole, GSA did a creditable job, it also held that GSA had failed to adequately explore certain environmental factors, that plaintiffs had

challenged certain findings of fact and that plaintiffs were not afforded a proper opportunity to adduce evidence in opposition to GSA's findings. *Hanly* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972) (hereinafter "*Hanly II*"). Furthermore, this Court was instructed to issue a preliminary injunction restraining further construction of the MCC should GSA conclude that a detailed environmental impact statement was required. On the other hand, if GSA were to reaffirm its previous findings, this Court, upon plaintiffs' motion, was to determine whether preliminary injunctive relief should issue.

GSA has now reaffirmed its previous findings in a supplemental report filed with the Court on April 6, 1973, and plaintiffs have now moved for a preliminary injunction.

Plaintiffs' Motion

In order to prevail on their motion, plaintiffs must show impending irreparable damage and a probability of success on the merits of their claim. *See, e.g.*, *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co., Inc.*, Docket No. 73-1223 (2d Cir. Mar. 12, 1973). This Court has little doubt, defendants' arguments notwithstanding, that plaintiffs will suffer irreparable damage if their motion is not granted. The question before this Court is, then, whether it is probable that defendants have violated the requirements of 42 U.S.C. § 4332(2)(C), *i.e.*, have they improperly failed to prepare a detailed environmental impact statement?

Section 4332(2)(C) states, in pertinent part:

"The Congress authorizes and directs that, to

> the fullest extent possible . . . (2) all agencies of the Federal Government shall—
>
> * * * *
>
> "(C) include in every major recommendation or report on proposals for legislation or other major Federal actions *significantly affecting the quality of the human environment*, a detailed statement by the responsible official on—
>
> "(i) the environmental impact of the proposed action. . . ." (Emphasis added.)

In *Hanly II*, the Court of Appeals determined that review of the alleged failure to comply with this section required a two-stage analysis: (1) defining the term "significantly" as a question of law; and (2) determining whether the MCC will have a significantly adverse impact as a question of fact.

With regard to the first issue, it was determined that the agency in charge—here, GSA—should review the construction of the MCC in the light of at lease two factors: (1) the adverse environmental effects of the MCC in excess of those created by existing uses in the community, and (2) the cumulative adverse environmental effects of the MCC in the community. This Court has carefully reviewed the supplemental findings to ensure that this standard was correctly employed and concludes that GSA has effected full compliance with the direction of the Court of Appeals. All factors remanded for reconsideration were first evaluated for any adverse environmental impact. Where it was determined that a potential for adverse impact existed—*e.g.*, a rise in crime in the area, increased contact between children

and persons involved in the Community Treatment Center—GSA evaluated the cumulative impact of the MCC. Its conclusion with regard to all factors was that no significant impact would result from construction of the MCC.

The next area of inquiry for this Court is, then, whether that conclusion is factually sound. The Court of Appeals, in *Hanly II*, determined that the appropriate criterion of review is the "arbitrary, capricious" standard as applied in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). That court employed a multi-stage review. The first question—whether GSA has acted within the scope of its authority in making the determination—has already been answered in the affirmative by the Court of Appeals in *Hanly I*. *Hanly* v. *Mitchell*, *supra*, 460 F.2d at 645. The second question is whether GSA's preliminary evaluation

> ". . . was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' . . . To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. *The court is not empowered to substitute its judgment for that of the agency.*" *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 416. (Emphasis added.) (Citations omitted.)

This review is to be based on the full administrative record before GSA at the time it made its decision. *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 420. Furthermore, this Court will restrict

itself to a review of only those environmental factors which the Court of Appeals remanded for further consideration since that Court was apparently satisfied that the findings with respect to the other factors were not "arbitrary or capricious".

The report begins with a finding that the MCC will not now, or in the future, provide a drug maintenance program. The only treatment available will be an internal detoxification component for prisoners who are alcoholic or chemical abusers. This finding is based upon the advice of the Bureau of Prisons, which will operate the MCC. Since plaintiffs have not submitted any evidence contradicting this statement, the Court concludes that the finding is not arbitrary or capricious.

The report next discusses the visibility of the detainees vis-a-vis area residents and concludes that there will be virtually no opportunity for such contact since all prisoner vans entering and leaving the MCC will be loaded and unloaded within the interior of the building. This finding is supported by the architectural firm responsible for the design of the MCC. Once again, although plaintiffs challenge the validity of GSA's finding, they have submitted absolutely no evidence to rebut it. Since GSA's factual determination seems reasonable in light of the record before it, this Court cannot say that it is arbitrary or capricious.

Indeed, this motion is replete with plaintiffs' unsupported challenges to GSA's findings. More specifically, GSA's finding of no adverse environmental impact with regard to the factors of (1) increased burdens on community medical facilities, (2) zoning, (3) public officials' prior knowledge of the project, (4) distance between buildings, (5) effect on light

and air, (6) visibility of rooftop recreation area, and (7) nonresident and observation study is supported by the record and uncontradicted by plaintiffs' evidence. While the Court will not detail those findings it is obvious from the administrative record that they are not arbitrary or capricious. There are, however, several factors which deserve further comment.

First, the report concludes that there will be little, if any, rise in crime in the area of the MCC. GSA has conducted a study of the rise in crime in other areas of the city which house detention facilities and has concluded that there is no correlation between the presence of such facilities and a higher crime rate. Furthermore, GSA has compared the crime rate for certain areas before and after construction of detention facilities (where those statistics were available) and could find no positive correlation between such construction and a rise in the crime rate for those areas. These findings are supported by New York Police Department and Bureau of Prisons statistics. While it is true that these statistics do not guarantee that crime will not increase in the area of the MCC, they do serve as a foundation in fact for such a finding and plaintiffs' unsupported allegations to the contrary do not convince this Court that the findings are arbitrary or capricious.

With regard to the architecture of the MCC, GSA has concluded that it is in harmony with the entire architectural concept of the civic center area. This finding is supported by a letter from the firm responsible for the design of the MCC. The Court concedes that while genuine disagreement may exist as to the aesthetic value of the present design, it is clear that GSA's finding is not arbitrary or capricious.

Lastly, the report concludes that there will be little chance for contacts between detainees, their visitors and children attending schools in the area. GSA bases this finding upon the location of schools in the area, the most likely routes which students will take to those schools, the number of visitors expected, the number of detainees expected to participate in the community treatment center and the restrictions placed upon their mobility within the community. Once again, it might be argued that GSA's determination is merely a self serving speculation. It is, nonetheless, a speculation with foundation in fact and not arbitrary, capricious or without reason.

It appears to this Court, as it apparently has to the Court of Appeals, *Hanly* v. *Kleindienst*, *supra*, 471 F.2d at 753, that plaintiffs' objections to the MCC are primarily psychological. A reading of the transcript of the January 30 hearing, and the papers submitted before and after the hearing, indicate that the members of the community feel that they have been lied to by federal, state and city officials; that they were promised, in return for investing in the Chatham Towers and Chatham Greens cooperative apartments, parks and other community facilities on what is now the site of the Courthouse Annex and the new Police Department Headquarters. None of those charges are documented and, even if they were, that issue is not before this Court. The scope of review is a narrow one and plaintiffs have failed to show that the supplemental findings are arbitrary or capricious. Furthermore, their fully justified complaint that they were not consulted with regard to, or allowed to submit evidence in opposition to, the construction of the MCC has been corrected by the Court of Appeals.

In *Hanly II*, the Second Circuit held that

> ". . . before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." *Hanly* v. *Kleindienst, supra*, 471 F.2d at 836.

GSA, in attempting to comply with those directions, both mailed and published notices of a "public meeting" to be held on January 30, 1973 for the purpose of receiving evidence relating to the effect of the MCC on the human environment. At that meeting some twenty-five persons made statements in opposition to the construction of the jail. In addiiton, written statements were received by the GSA both during and after the proceedings.

Plaintiffs now claim that the "hearing" was not in accordance with the *Hanly II* opinion for two reasons: (1) the members of the panel were not impartial and disinterested parties and (2) there was no opportunity for cross-examination of witnesses. As to the first stated objection, plaintiffs argue that a panel composed of representatives from GSA, the Federal Bureau of Prisons, and the Regional Commissioner of Public Buildings is obviously biased in favor of the construction of the MCC. As to the second objection, plaintiffs claim that the failure to produce witnesses in favor of the project and thus subject them to cross-examination is evidence that the "hearing" was little more than an attempt to appease opponents of the project.

This Court does not, however, read the *Hanly II* opinion as requiring the type of adversary proceedings which plaintiffs feel they are entitled to.

> "We do not suggest that a full-fledged formal hearing must be provided before each such determination is made, although it should be apparent that in many cases such a hearing would be advisable for reasons already indicated. The necessity for a hearing will depend greately upon the circumstances surrounding the particular proposed action and upon the likelihood that a hearing will be more effective than other methods in developing relevant information and an understanding of the proposed action. *The precise procedural steps to be adopted are better left to the agency, which should be in a better position than the court to determine whether solution of the problems faced with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data.*"

GSA, acting within the discretion accorded to it by the Court of Appeals, chose not to hold "formal" hearings but rather to hold a public meeting at which concerned members of the community could express their views and submit evidence in opposition to the MCC. In this regard, GSA clearly fulfilled the intended two-fold object of such proceedings, *i.e.*, to allow the community to present its views of the effect of the project on the human environment and to create a record reviewable by the courts. Certainly, if the Court of Appeals felt that it was not in a better position that GSA to determine the precise procedural steps to be taken in fulfillment of those objectives, neither can this Court be in such a position.

Since the "hearing" was not intended to be an adversary-type proceeding in which a decision would be made only upon the evidence there adduced, there

was no need for a neutral panel. Indeed, it is only logical that those who are charged with the responsibility of making the determination be present to hear firsthand the objections to the project. There is no suggestion of any impropriety other than the composition of the panel and, indeed, there could be none since all evidence proffered was accepted without reservation. Furthermore, since the object of the meeting was merely to collect information from the community, GSA was under no obligation to present witnesses and the lack of an opportunity to cross-examine such witnesses does not run afoul of *Hanly II*.

One final comment is required in connection with plaintiffs' motion for a preliminary injunction. For the first time since these proceedings were commenced, plaintiffs now argue that GSA has failed to consider any beneficial effects of the MCC as required by the Council on Environmental Quality Guidelines, 36 Fed. Reg. 7724, 7725 (1971), and that, therefore, an injunction should issue. Those guidelines, however, refer to the actual preparation of the detailed impact statement and not the initial assessment. Furthermore, the guidelines are permissive rather than mandatory.

Defendants' Motion

Defendants have moved for summary judgment as to plaintiffs' claim for injunctive relief. Plaintiffs oppose the motion on the grounds that two issues of fact remain to be determined: (1) whether the MCC will significantly affect the quality of the human environment and (2) whether GSA's determination was arbitrary or capricious. The first "issue" is nonexistent. It is not up to this Court to determine

whether the MCC will significantly affect the quality of the human environment. That determination is to be, and has been, made by GSA. The narrow question before the Court is whether that determination was arbitrary or capricious.

In deciding the second issue, the Court is to base its review on the full administrative record before GSA. *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 402 U.S. at 420. There is no issue of fact in this case as to what that record consisted of; the Court has the full record before it now. Plaintiffs are not entitled to bring in additional witnesses at a trial on the merits. The Court of Appeals provided them an opportunity for the presentation of such witnesses at the public meeting conducted by GSA. This Court holds then, for the reasons given *supra*, that GSA's determination that the MCC does not significantly affect the quality of the human environment is not arbitrary or capricious.

Therefore, and for the foregoing reasons, plaintiffs' motion for a preliminary injunction is denied and defendants' motion for summary judgment dismissing plaintiffs' claim for injunctive relief is granted.

Submit order in accordance with this opinion on five (5) days notice.

Dated: New York, New York
June 14, 1973

CHARLES H. TENNEY
U.S.D.J.

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